IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 24, 2006 Session

STATE OF TENNESSEE v. ALBERT FREEMAN COX

Appeal from the Criminal Court for Knox County
No. 81040 Richard R. Baumgartner, Judge

No. E2005-01066-CCA-R3-CD Filed March 8, 2006

The defendant, Albert Freeman Cox, appeals from the Knox County Criminal Court's order affirming the Knox County General Sessions Court's revocation of his 2004 conviction of driving under the influence (DUI). The record supports the order of revocation, and we affirm the criminal court's order.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JOSEPH M. TIPTON, J., joined.

A. Philip Lomonaco, Knoxville, Tennessee, for the Appellant, Albert Freeman Cox.

Paul G. Summers, Attorney General & Reporter; David E. Coenen, Assistant Attorney General; Randall E. Nichols, District Attorney General; and John Halstead and Andrea A. Kline, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

The defendant pleaded guilty to DUI in the Knox County General Sessions Court on August 12, 2004, and received a sentence of 11 months, 29 days, with 48 hours to be served in confinement and the balance of the sentence to be served on probation. His driver's license was suspended for a year, but the defendant was granted a restricted license for driving to and from work. He was ordered to attend DUI school and pay court costs and a $350 fine. On October 25, 2004, the state alleged in a filed probation violation warrant that the defendant had failed to pay the fine and costs, had failed to attend DUI school, and had been charged with a new DUI offense and a violation of the implied consent law. The general sessions court revoked the original probation on January 14, 2005. On January 20, 2005, the defendant filed a notice of his appeal to the criminal court. In the criminal court hearing, a Knoxville police officer testified that, at 9:01 p.m. on August 31, 2004, the defendant abruptly pulled his Mercedes automobile onto North Broadway in front of the officer's cruiser and another car, causing the officer to use "excessive brakes." The officer stopped the

Mercedes, and the defendant stepped out of the vehicle. The officer noticed that the defendant's clothes were "in kind of a ruffle," he was sweating, his speech was slurred, and the odor of alcohol emanated from the defendant. Initially, the defendant denied that he had been drinking, but when the officer told him that he smelled of alcohol, the defendant admitted that he had consumed two beers. The officer testified that the defendant said "he had been at a friend's house playing bridge, and he was on his way home." After the defendant failed two field sobriety tests, the officer arrested him for DUI. The defendant declined to take a blood alcohol test but also declined to sign the refusal form. When the defendant's wife and a friend came to retrieve the defendant's car after a call from the officer, the friend said that the defendant had been "at their house that night playing bridge, and he was on his way to Ruby Tuesday's to pick up food and then was on his way home."

Following the hearing, the criminal court entered an order on April 22, 2005, affirming the general sessions court's revocation order. On April 29, 2005, the defendant filed his notice of appeal to this court. On appeal, the defendant claims that the 11-month, 29-day sentence is excessive.

The standard of review upon appeal of an order revoking probation is the abuse of discretion standard. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). In order for an abuse of discretion to occur, the reviewing court must find that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the terms of probation has occurred. *Id.*; *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The trial court is required only to find that the violation of probation occurred by a preponderance of the evidence. Tenn. Code Ann. § 40-35-311(e) (2003). Upon finding a violation, the trial court is vested with the statutory authority to "revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered." *Id.* Furthermore, when probation is revoked, "the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension." *Id.* § 40-35-310. The trial judge retains the discretionary authority to order the defendant to serve the original sentence. *See State v. Duke*, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995).

In the present case, the evidence supports the criminal court's determination that the defendant violated his August 12, 2004 probation by committing a second DUI on August 31, 2004. As mentioned above, the court was authorized in its discretion to order the defendant to serve the entirety of the previously-suspended sentence in confinement. The criminal court did not abuse its discretion in ordering the original sentence into full force and effect.

The defendant is aggrieved that the trial court did not analyze the propriety of confinement of the balance of the 11-month, 29-day sentence pursuant to the Criminal Sentencing Reform Act of l989. *See, e.g.*, Tenn. Code Ann. § 40-35-102 through -104, -113, -114, -203, -209, -210, -212, -302, & -303 (2003). The analytical regimen required in the sentencing process, however, is not applicable when a court merely revokes a suspended sentence and orders the original sentence to be served.

> A trial court's authority varies in revocation proceedings depending on whether the case before it involves probation or a community corrections sentence. A trial court, upon revoking a community corrections sentence, "may resentence the defendant to any appropriate sentencing alternative, including incarceration, for any period of time up to the maximum sentence provided for the offense committed . . . ." T.C.A. § 40-36-106(e)(4). By contrast, a trial court revoking probation has the authority to extend the period of probation supervision for a period not to exceed two years; order execution of the original judgment; or, if the violation resulted in an additional conviction, order the new sentence to be served consecutively to the original judgment. T.C.A. §§ 40-35-308(c), -310, -311; *State v. Hunter*, 1 S.W.3d 643, 647 (Tenn. 1999). *It cannot resentence the defendant.*

State v. Johnny Arwood, No. E2004-00319-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Dec. 9, 2004) (emphasis added); *see* Tenn. Code Ann. § 40-36-106(e)(4) (2003) (empowering court, upon revocation of a community corrections sentence, to resentence the petitioner to incarceration "for any period of time up to the maximum sentence provided for the offense committed"). *Compare id.* § 40-36-106(e)(4) *with id.* § 40-35-311(d) (2003) (upon revocation of probation, court may "cause the defendant to commence the execution of the judgment as originally entered"). "Moreover, a ruling that probation has been violated is not a new conviction. . . ." *State v. Jackson*, 60 S.W.3d 738, 743 (Tenn. 2001). Essentially, the revocation operates upon a previously adjudicated conviction and sentence.

In the present case, no appeal of the original 11-month, 29-day DUI sentence is before us; apparently, the judgment imposing the sentence matured into a final order. *See* Tenn. Code Ann. § 27-5-108 (2000) (establishing ten-day period for taking appeals from general sessions court). In any event, the original sentencing court had no discretion in establishing the length of the DUI sentence. All DUI sentences are established by statute at the maximum of 11 months, 29 days. *See* Tenn. Code Ann. § 55-10-402(c) (2004) ("[A]ll persons sentenced under [Code section 403] (a) shall, in addition to the service of at least the minimum sentence, be required to serve the difference between the time actually served and the maximum sentence on probation."); *State v. Troutman*, 979 S.W.2d 271, 273 (Tenn. 1998); *State v. Combs*, 945 S.W.2d 770, 774 (Tenn. Crim. App. 1996).

We discern no error in the criminal court's proceedings and affirm its order.

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JAMES CURWOOD WITT, JR., JUDGE